

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

MICHAEL MURR,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting

Commissioner of Social Security

Administration,

Defendant.

NO. 1:14-cv-03144-SAB

**ORDER GRANTING
PLAINTIFF'S MOTON FOR
SUMMARY JUDGMENT;
DENYING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT**

Before the Court are Plaintiff's Motion for Summary Judgment, ECF No. 13, and Defendant's Motion for Summary Judgment, ECF No. 19. The motions were heard without oral argument. Plaintiff is represented by D. James Tree. Defendant is represented by Assistant United States Attorney Pamela De Rusha and Special Assistant United States Attorney Daphne Banay.

I. Jurisdiction

On June 23, 2010, Plaintiff filed a Title II application for disability insurance benefits and a Title XVI application for supplemental security income (SSI). In both applications, Plaintiff alleged he is disabled beginning June 22, 2010, due to learning disabilities, intellectual disability, and depression.

**ORDER GRANTING PLAINTIFF'S MOTON FOR SUMMARY
JUDGMENT; DENYING DEFENDANT'S MOTION FOR SUMMARY
JUDGMENT ~ 1**

1 His application was denied initially on December 3, 2010, and again denied
2 on reconsideration on February 8, 2011. A timely request for a hearing was made.

3 On October 9, 2012, a video hearing was scheduled. Plaintiff's counsel was
4 present in Yakima, but because the prior hearing had run over by one-and-a-half
5 hours, Plaintiff left when his ride showed up, thinking if he missed his ride, he
6 would have to walk home and lose his ride privileges. The ALJ, after hearing what
7 had happened, continued with the testimony of the vocational expert Trevor
8 Duncan, M.Ed, MBA, CDMS. Afterward, she sent Plaintiff a "show cause" letter.
9 Plaintiff filed a response, and the ALJ found good cause existed for Plaintiff's
10 failure to appear. A video hearing was rescheduled for May 14, 2013. On that day,
11 Plaintiff appeared at the video hearing in Yakima, Washington before
12 Administrative Law Judge (ALJ) Laura Valente who presided over the hearing
13 from Seattle. Kimberly Mullinax, vocational expert, also appeared at the hearing.
14 Plaintiff was represented by attorney D. James Tree.

15 The ALJ issued a decision on July 12, 2013, finding that Plaintiff was not
16 disabled. Plaintiff timely requested review by the Appeals Council, which denied
17 his request for review on August 22, 2014. The Appeals Council's denial of
18 review makes the ALJ's decision the final decision of the Commissioner. 42
19 U.S.C. §405(h).

20 Plaintiff filed a timely appeal with the U.S. District Court for the Eastern
21 District of Washington on October 7, 2014. The instant matter is before this Court
22 pursuant to 42 U.S.C. § 405(g).

23 **II. Sequential Evaluation Process**

24 The Social Security Act defines disability as the "inability to engage in any
25 substantial gainful activity by reason of any medically determinable physical or
26 mental impairment which can be expected to result in death or which has lasted or
27 can be expected to last for a continuous period of not less than twelve months."

28 42 U.S.C. § 423(d)(1)(A). A claimant shall be determined to be under a disability

1 only if his impairments are of such severity that the claimant is not only unable to
2 do his previous work, but cannot, considering claimant's age, education and work
3 experiences, engage in any other substantial gainful work which exists in the
4 national economy. 42 U.S.C. §423(d)(2)(A).

5 The Commissioner has established a five-step sequential evaluation process
6 for determining whether a person is disabled. 20 C.F.R. § 416.920(a)(4); *Bowen v.*
7 *Yuckert*, 482 U.S. 137, 140-42 (1987).

8 Step 1: Is the claimant engaged in substantial gainful activities? 20 C.F.R. §
9 416.920(b). Substantial gainful activity is work done for pay and requires
10 compensation above the statutory minimum. 20 C.F.R. § 416.972(a); *Keyes v.*
11 *Sullivan*, 894 F.2d 1053, 1057 (9th Cir. 1990). If the claimant is engaged in
12 substantial activity, benefits are denied. 20 C.F.R. § 416.971. If he is not, the ALJ
13 proceeds to step two.

14 Step 2: Does the claimant have a medically-severe impairment or
15 combination of impairments? 20 C.F.R. § 416.920(c). If the claimant does not
16 have a severe impairment or combination of impairments, the disability claim is
17 denied. A severe impairment is one that lasted or must be expected to last for at
18 least 12 months and must be proven through objective medical evidence. 20
19 C.F.R. § 416.909. If the impairment is severe, the evaluation proceeds to the third
20 step.

21 Step 3: Does the claimant's impairment meet or equal one of the listed
22 impairments acknowledged by the Commissioner to be so severe as to preclude
23 substantial gainful activity? 20 C.F.R. § 416.920(d); 20 C.F.R. § 404 Subpt. P.
24 App. 1. If the impairment meets or equals one of the listed impairments, the
25 claimant is conclusively presumed to be disabled. *Id.* If the impairment is not one
26 conclusively presumed to be disabling, the evaluation proceeds to the fourth step.

27 Before considering Step 4, the ALJ must first determine the claimant's
28 residual functional capacity. 20 C.F.R. § 416.920(e). An individual's residual

1 functional capacity is his ability to do physical and mental work activities on a
2 sustained basis despite limitations from her impairments.

3 Step 4: Does the impairment prevent the claimant from performing work he
4 has performed in the past? 20 C.F.R. § 416.920(f). If the claimant is able to
5 perform his previous work, he is not disabled. *Id.* If the claimant cannot perform
6 this work, the evaluation proceeds to the fifth and final step.

7 Step 5: Is the claimant able to perform other work in the national economy
8 in view of his age, education, and work experience? 20 C.F.R. § 416.920(g).

9 The initial burden of proof rests upon the claimant to establish a prima facie
10 case of entitlement to disability benefits. *Tackett v. Apfel*, 108 F.3d 1094, 1098
11 (9th Cir. 1999). This burden is met once a claimant establishes that a physical or
12 mental impairment prevents his from engaging in her previous occupation. *Id.* At
13 step five, the burden shifts to the Commissioner to show that the claimant can
14 perform other substantial gainful activity. *Id.*

15 **III. Standard of Review**

16 The Commissioner's determination will be set aside only when the ALJ's
17 findings are based on legal error or are not supported by substantial evidence in
18 the record as a whole. *Matney v. Sullivan*, 981 F.2d 1016, 1018 (9th Cir. 1992)
19 (citing 42 U.S.C. § 405(g)). Substantial evidence is "more than a mere scintilla,"
20 *Richardson v. Perales*, 402 U.S. 389, 401 (1971), but "less than a preponderance."
21 *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n. 10 (9th Cir. 1975). Substantial
22 evidence is "such relevant evidence as a reasonable mind might accept as adequate
23 to support a conclusion." *Richardson*, 402 U.S. at 401. The Court must uphold the
24 ALJ's denial of benefits if the evidence is susceptible to more than one rational
25 interpretation, one of which supports the decision of the administrative law judge.
26 *Batson v. Barnhart*, 359 F.3d 1190, 1193 (9th Cir. 2004). "If the evidence can
27 support either outcome, the court may not substitute its judgment for that of the
28 ALJ." *Matney*, 981 F.2d at 1019.

1 A decision supported by substantial evidence will be set aside if the proper
2 legal standards were not applied in weighing the evidence and making the
3 decision. *Browner v. Secretary of Health & Human Servs.*, 839 F.2d 432, 433 (9th
4 Cir. 1988). An ALJ is allowed “inconsequential” errors as long as they are
5 immaterial to the ultimate nondisability determination.” *Stout v. Comm’r, Soc. Sec.*
6 *Admin.*, 454 F.3d 1050, 1055 (9th Cir. 2006).

7 **IV. Statement of Facts**

8 The facts have been presented in the administrative transcript and the ALJ’s
9 decision and will only be summarized here.

10 At the time of the hearing, Plaintiff was 20 years old. Although Plaintiff
11 graduated from high school, he was in special education classes throughout the
12 entirety of his school years. He received a Special Education twelfth grade
13 equivalency. Plaintiff has past part-time work experience. He worked as a park
14 aide for four months, picking up garbage and helping clean parks; worked for
15 Little Caesar’s Pizza for a year; and worked for a year at the Yakima Transit
16 Center selling bus passes. This position was characterized as on-the-job training in
17 the record.

18 Plaintiff lives with his parents. He mows the lawn and cleans his room. He
19 is able to cook simple meals, but needs assistance to shop for groceries. He does
20 not have a driver’s license. He has failed the written driving test three times. He
21 usually uses Dial-A-Ride to attend appointments. His latest IQ testing reveals a
22 Full Scale IQ of 71. He has difficulty with abstract thought processes to make
23 good decisions and judgments. He spends most of his days at the Sunrise Club,
24 which is a day treatment program supported by Central Washington
25 Comprehensive Mental Health. There, he assists at the front desk and also assists
26 in the thrift store.

27 In 2007, when Plaintiff was 17, he sexually molested a friend of his younger
28 brother by kissing him and putting his hands down his pants. The boy reported the

1 molestation in 2008. Plaintiff was interviewed by police officers and he admitted
2 to touching the victim. In 2009, he was charged with First Degree Child
3 Molestation and was sentenced to 30 days in jail. At the time of the hearing, he
4 was actively participating in sexual offender counseling with Mark Cross, PhD.
5 Dr. Cross is a Certified Sex Offender Treatment Provider.

6 **V. The ALJ's findings**

7 At step one, the ALJ found Plaintiff has not engaged in substantial gainful
8 activity since June 22, 2010, the application date. (Tr. 21.)

9 At step two, the ALJ found Plaintiff has the following severe impairments:
10 learning disorder, borderline intellectual functioning and depressive disorder. (Tr.
11 21.)

12 At step three, the ALJ found that Plaintiff's impairments or combinations of
13 impairments do not meet or medically equal Listing 12.05 (Intellectual Disability).
14 (Tr. 22.)

15 The ALJ concluded that Plaintiff has the residual functional capacity to
16 perform a full range of work with the following limitations: He can climb ramps
17 and stairs without limitations; frequently climb ladders, ropes, and scaffolds,
18 balance, stoop and crawl; crouch and kneel without limitations. He has frequent
19 near and far acuity with lenses and should avoid concentrated exposure to hazards
20 such as dangerous moving machinery and heights.

21 The ALJ found that Plaintiff has sufficient concentration to understand,
22 remember and carry out simple, repetitive tasks; can maintain concentration and
23 attention in 2-hour increments for simple, repetitive type work throughout an 8-
24 hour workday with usual and customary breaks; can work in proximity to an
25 unlimited number of coworkers, but he should not work in coordination with
26 them; can get along with coworkers without distracting them; can work
27 superficially and occasionally with the general public; can have occasional
28 interaction with supervisors; can respond to simple changes in the workplace, as

1 may be required and as are consistent for a simple repetitive type work
2 environment. The ALJ concluded that with the above restrictions, Plaintiff can
3 complete a normal workday without interruption. (Tr. 24.)

4 At step four, the ALJ found Plaintiff was not capable of performing any past
5 relevant work as an information clerk, pizza baker, cashier, and park aide. (Tr. 32.)

6 At step five, the ALJ found there were jobs that exist in significant numbers
7 in the national economy that Plaintiff can perform. (Tr. 32.) Because Plaintiff's
8 ability to perform work at all exertional levels was compromised by his
9 nonexertional limitations, the ALJ consulted with the vocational expert, who
10 determined that Plaintiff can perform the requirements of representative
11 occupations such as assembler, and cleaner, housekeeping.¹ (Tr. 34.) As a result,
12 the ALJ concluded that Plaintiff has not been under a disability, as defined in the
13 Social Security Act, since June 23, 2010.

14 **VI. Issues for Review**

15 1. Did the ALJ commit harmful, reversible error in discounting Dr.
16 Mark Cross's extensive treatment notes and specifically in rejecting his Mental
17 Source Statement in formulating her RFC findings?

18 2. Did the ALJ commit harmful, reversible error by failing to weigh the
19 opinions of Ms. Boyer and Ms. Spitler, and improperly selecting limited
20 information from their reports to support her conclusions?

21 3. When the improperly discredited evidence is credited-as-true does it
22 become clear that the proper remedy is remand for an immediate award of
23 benefits?

24 4. Did the ALJ commit harmful, reversible error in discounting
25 Plaintiff's credibility on the basis of an erroneous interpretation of his activities of
26 daily living?

27
28 ¹ At the prior hearing, the vocational expert identified other representative occupations Plaintiff could perform such as auto cleaner, production assembler, and mail clerk. (Tr. 34.)

VII. Discussion

After reviewing the record and specifically the transcript of the hearing, it becomes clear that Plaintiff is unable to perform gainful employment in the national economy. As Plaintiff's attorney demonstrated at the hearing, Plaintiff's defense mechanism when he is unsure of the question is to generally agree with statements posed by the ALJ. Rather than recognize this, the ALJ just continued the questions as if Plaintiff had answered accurately. She then relied on his answers to her statements to support her decision that Plaintiff is not disabled. The record adequately demonstrates that Plaintiff thinks slowly and when he is unable to process information quickly enough, he simply agrees with the questioner. This is adequately explained in the record, and specifically by Dr. Ronald Roesch, a forensic psychologist who evaluated Plaintiff's understanding of his *Miranda* rights when he was arrested as well as his risk of reoffending in the future. Additionally, in their police reports written in 2008, the Union Gap police officers noted that Plaintiff suffers from some sort of mental disability and is slow at processing information. It was readily apparent to these officers that Plaintiff was not a normal functioning adult. Yet, in spite of all this evidence, the ALJ concluded that Plaintiff "is a highly functioning individual who has made a few bad mistakes in his life." This conclusion is not supported by substantial evidence.

The ALJ gave little weight to Dr. Cross' residual functional capacity assessment because Dr. Cross has been treating Plaintiff to ensure that he complies with court-mandated conditions and to rehabilitate him, which apparently disqualifies him from evaluating whether Plaintiff could sustain a full time job. The ALJ concluded that Dr. Cross' ratings are inconsistent with Plaintiff's work history, and his active lifestyle. The ALJ's rejection of Dr. Cross' opinion was in error.

Notably, Dr. Cross is a treatment provider who has continued to treat him over the years. His opinion has remained unchanged. He assessed **mild-to-**

1 **moderate limitations** in the ability to ask simple questions or request assistance,
2 and **moderate limitations** in the ability to understand and remember very short
3 and simple instructions.

4 He assessed **moderate-to-marked limitations** in the ability to:

- 5 • perform activities within a schedule, maintain regular attendance and be
- 6 punctual within customary tolerances;
- 7 • sustain an ordinary routine without special supervision,
- 8 • make simple work-related decisions;
- 9 • accept instructions and respond appropriately to criticism from
- 10 supervisors;
- 11 • get along with co-workers or peers without distracting them or
- 12 exhibiting behavioral extremes;
- 13 • maintain socially appropriate behavior and to adhere to basic standards
- 14 of neatness or cleanliness;
- 15 • be aware of normal hazards and take appropriate precautions.

16 He assessed **marked limitations** in the ability to:

- 17 • remember locations and work-like procedures;
- 18 • understand and remember very short and simple instructions;
- 19 • maintain attention and concentration for extended periods;
- 20 • complete a normal workday and workweek without interruptions from
- 21 psychologically based symptoms and to perform at a consistent pace
- 22 without an unreasonable number and length of rest periods;
- 23 • set realistic goals or make plans independently of others.

24 He assessed **marked to severe limitations** in the ability to:

- 25 • understand and remember detailed instructions;
- 26 • carry out detailed instructions;
- 27 • work in coordination with or proximity to others without being
- 28 distracted by them;

- interact appropriately with the general public;
- respond appropriately to changes in the work setting

According to Dr. Cross, Plaintiff's ability to think in the abstract, that is to predict the outcomes of various choices, is **extremely limited**. This conclusion is supported in the record.

The ALJ is tasked with resolving conflicts in the medical evidence. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). Generally speaking, three types of doctors provide medical evidence: treating doctors, examining doctors, and reviewing (non-examining) doctors. "By rule the Social Security Administration favors the opinion of a treating physician over non-treating physicians." 20 C.F.R. § 416.927²; *Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007). "If a treating physician's opinion is well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in the case record, it will be given controlling weight." *Orn*, 495 F.3d at 631. If a treating physician's opinion is not given "controlling weight" because it does not meet these requirements, the ALJ should consider (i) the length of the treatment relationship and the frequency of examination by the treating physician; and (ii) the nature and extent of the treatment relationship between the patient and the treating physician in determining the weight it will be given. *Id.* The ALJ is not required, however, to merely accept the opinion of a treating doctor. *Lester v.*

² 20 C.F.R. § 416.927(c)(2) states: Generally, we give more weight to opinions from your treating sources, since these sources are likely to be the medical professionals most able to provide a detailed, longitudinal picture of your medical impairment(s) and may bring a unique perspective to the medical evidence that cannot be obtained from the objective medical findings alone or from reports of individual examinations, such as consultative examinations or brief hospitalizations.

1 *Chater*, 81 F.3d 821, 830 (9th Cir. 1995). Where contradicted, the ALJ may reject
2 the opinion for specific and legitimate reasons that are supported by substantial
3 evidence in the record. *Id.* On the other hand, where the treating doctor's opinion
4 is uncontradicted, the ALJ can only reject it for clear and convincing reasons. *Id.*
5 The opinions of examining physicians are afforded more weight than those of non-
6 examining physicians. *Id.*

7 Factors the ALJ should consider in evaluating any medical opinion (not
8 limited to the opinion of the treating physician) include: (1) the amount of relevant
9 evidence that supports the opinion and the quality of the explanation provided; (2)
10 the consistency of the medical opinion with the record as a whole; (3) the specialty
11 of the physician providing the opinion; and (4) other factors, such as the degree of
12 understanding a physician has of the Administration's disability programs and
13 their evidentiary requirements and the degree of his or her familiarity with other
14 information in the case record. *Orn*, 495 F.3d at 631.

15 In this case, the ALJ made a number of errors in issuing her ruling. First, the
16 ALJ erred in imposing a blanket rejection of opinions from providers who were
17 not specifically assessing Plaintiff's ability to work, such as Dr. Cross and Dr.
18 Roesch. In doing so, she failed to consider important information contained in the
19 record regarding Plaintiff's true abilities. Moreover, the ALJ erred in not crediting
20 Dr. Cross's opinions, which were substantially supported by the opinions of Dr.
21 Roesch, Debbie Spitler, and Krystal Boyer. Additionally, Dr. Schultz concluded
22 that Plaintiff's low retrieval, learning slope, and working memory would create
23 problems in a work situation resulting in difficulties remembering and learning
24 new tasks, which supports Dr. Cross's conclusions about Plaintiff's ability to
25 work. (Tr. 533.) Dr. Cross is a treating provider, who spent considerable time with
26 Plaintiff, was consistent in his opinions, and has the specialty and expertise to
27 evaluate Plaintiff. The ALJ erred in giving more weight to the opinions of non-
28 examining experts. The record demonstrates that Plaintiff worked unsuccessfully

1 at three part-time jobs, which is substantial evidence that Plaintiff is not able to
2 succeed at full-time work. The ALJ erred in concluding that these jobs
3 demonstrated an ability to successfully engage in full-time, on-going, and regular
4 work.

5 Additionally, the ALJ's conclusions regarding Plaintiff's activities of daily
6 living are not supported by the record. As such, the ALJ committed reversible
7 error in discounting Plaintiff's credibility based on her characterization of his daily
8 living activities. Plaintiff lives with his parents. He is not independent. He testified
9 that he needs help when he goes grocery shopping. While the record indicates that
10 he took college classes, it appears that these classes were Adult Basic Education
11 classes, not classes the general population usually takes. Also, it appears that the
12 ALJ failed to make the connection that the Sunrise Club is an establishment open
13 only to those in mental health treatment at Central Washington Comprehensive
14 Mental Health. It is a day treatment program for persons with mental disabilities;
15 yet the ALJ appeared to equate Plaintiff's attendance at the Club with
16 employment. Plaintiff did not apply for a job at the Sunrise Club. Rather, he
17 spends time at the club, and while there he volunteers to complete tasks for the
18 benefit of the members. It appears that each task lasts no more than 1 hour at a
19 time. Similarly, the ALJ's reliance on Plaintiff's participation in Toastmasters is
20 misplaced. It is apparent from even reading a stale transcript that Plaintiff has
21 intellectual deficits. His attorney writes that Plaintiff has intellectual defects that
22 are obvious when talking to him and the Court accepts this as true. It is easy to
23 infer that Plaintiff's participation in Toastmasters may meet a social need, but the
24 record does not support a finding that his participation in Toastmasters
25 demonstrates transferable work skills.

26 It is obvious to the Court after reviewing the complete record that Plaintiff
27 is incapable of successfully engaging in substantial gainful activity on a full-time,
28 regular, and ongoing basis, even if the tasks he is given are simple and repetitive.

**ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT; DENYING DEFENDANT'S MOTION FOR SUMMARY
JUDGMENT ~ 12**

1 The only question, then, is whether the Court should remand the case for
2 additional proceedings, or remand for award and calculation of benefits.

3 Recently, the Ninth Circuit set forth three steps the Court needs to take in
4 applying the “credit-as-true” rule. First, the Court must determine whether the
5 “ALJ failed to provide legally sufficient reasons for rejecting evidence, whether
6 claimant testimony or medical opinion.” *Treichler v. Comm.*, 775 F.3d 1090,
7 1100-01 (9th Cir. 2014). Second, if the ALJ has erred, the Court needs to determine
8 whether “‘the record is fully developed,’ whether there are ‘outstanding issues that
9 must be resolved before a determination of disability can be made’ and whether
10 further administrative proceedings would be useful.” *Id.* (Citations omitted).
11 Further administrative proceedings are generally useful “where the record ‘has not
12 been fully developed,’ there is a need to resolve conflicts and ambiguities, or the
13 ‘presentation of further evidence . . . may well prove enlightening’ in light of the
14 passage of time.” *Id.* (Citations omitted). Third, if the Court concludes that no
15 outstanding issues remain and further proceedings would not be useful, the court
16 may apply the Ninth Circuit’s prophylactic *Varney* rule to find the relevant
17 testimony credible as a matter of law. *Id.*

18 The Court finds this case is one of those “rare circumstances” that permits it
19 to exercise its discretion to depart from the ordinary remand rule. As set forth
20 above, the ALJ failed to provide legally sufficient reasons for rejecting Dr. Cross’
21 testimony. The record is fully developed and no outstanding issues remain. If Dr.
22 Cross’ testimony is credited and given its proper weight, it is clear that Plaintiff is
23 unable to perform substantial gainful employment. As such, a remand for a
24 calculation and award of benefits is appropriate.

25 Accordingly, **IT IS HEREBY ORDERED:**

26 1. Plaintiff’s Motion for Summary Judgment, ECF No. 13, is **GRANTED**.

27 2. Defendant’s Motion for Summary Judgment, ECF No. 19, is **DENIED**.

28 3. The decision of the Commissioner denying benefits is **reversed** and

**ORDER GRANTING PLAINTIFF’S MOTON FOR SUMMARY
JUDGMENT; DENYING DEFENDANT’S MOTION FOR SUMMARY
JUDGMENT ~ 13**

1 **remanded** to the agency for further proceedings consistent with this Order.

2 4. The District Court Executive is directed to enter judgment in favor of
3 Plaintiff and against Defendant.

4 **IT IS SO ORDERED.** The District Court Executive is hereby directed to
5 file this Order and provide copies to counsel.

6 **DATED** this 13th day of July, 2015.



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12 Stanley A. Bastian
13 United States District Judge
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